Supreme Court, U.S.
FILED

10-413 SEP 24 2010

OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

GABRIEL R. CONTRERAS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari To The United States Court of Appeals for the Armed Forces

---

PETITION FOR WRIT OF CERTIORARI

Phillip T. Korman
Captain, U.S. Air Force
Counsel of Record

Air Force Appellate
Defense Division
112 Luke Ave, Ste 343
Bolling AFB, DC 20032
(202) 767-1562

QUESTION PRESENTED

Is a violation of Article 134, Uniform Code of Military Justice, the General Article, which prohibits, among other things, conduct "to the prejudice of good order and discipline in the armed forces" or "of a nature to bring discredit upon the armed forces," a "purely military offense?"

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....v

OPINIONS BELOW.....1

JURISDICTION.....1

REGULATORY PROVISIONS INVOLVED...1

STATEMENT OF THE CASE.....3

REASONS FOR GRANTING THE WRIT.....6

A. Certioari is necessary to settle the important federal law question of whether an offense arising under Article 134, UCMJ, is "purely military" where its terms require proof of uniquely military concepts.....7

B. The CAAF's analysis prejudiced Petitioner by not properly considering the uniquely military elements of Article 134, UCMJ, and upholding the Article 130 housebreaking conviction.....10

CONCLUSION.....10

APPENDIX.....1a

APPENDIX

Court of Appeals for the Armed Forces Decision.....1a

Court of Appeals for the Armed Forces Order.....18a

Air Force Court of Criminal Appeals Decision.....20a

10 U.S.C. § 802, Article 2, UCMJ.....36a

10 U.S.C. § 884, Article 84, UCMJ.....39a

10 U.S.C. § 892, Article 92, UCMJ.....40a

10 U.S.C. § 910, Article 110, UCMJ.....41a

10 U.S.C. § 915, Article 115, UCMJ.....42a

10 U.S.C. § 930, Article 130, UCMJ.....43a

10 U.S.C. § 933, Article 133, UCMJ.....44a

10 U.S.C. § 934, Article 134, UCMJ.....45a

Artcle L, American Articles of War of 1775.....46a

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 56.c(3) (2005 ed.).....47a

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt IV, para. 90.b. (2005 ed.).....48a

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 91.b. (2005 ed.).....49a

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 107.b. (2005 ed.)....50a

TABLE OF AUTHORITIES

Cases

Supreme Court of the United States

Grisham v. Hagan, 361 U.S. 278 (1960).....9

Kinsella v. United States ex. rel. Singleton, 361 U.S. 234 (1960).....9

Parker v. Levy, 417 U.S. 733 (1974).....3

United States ex. rel. Toth v. Quarles, 350 U.S. 11 (1955).....9

United States Court of Appeals

United States v. Conliffe, 67 M.J. 127 (C.A.A.F. 2009).....8

Statutes and Rules

Act of Aug. 29, 1916, c. 418, 39 Stat. 619, 666.....3

Article L, American Articles of War of 1775.....3

National Defense Authorization Act for Fiscal Year 2006, Pub.L. No. 109-163, § 552(a)(2)(f), 119 Stat. 3136, 3263 (2006).....7

Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.*:

10 U.S.C. § 802 (Article 2).....5-6,8,10

10 U.S.C. § 884 (Article 84).....9

10 U.S.C. § 892 (Article 92).....9

10 U.S.C. § 910 (Article 110).....9

10 U.S.C. § 915 (Article 115).....9

10 U.S.C. § 920 (Article 120).....4,7

10 U.S.C. § 930 (Article 130).....*passim*

10 U.S.C. § 933 (Article 133).....8

10 U.S.C. § 934 (Article 134).....*passim*

28 U.S.C. § 1259(3).....1

RULE FOR COURTS-MARTIAL (R.C.M.) 201.....7

Miscellaneous Authorities

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 56.c(3) (2005 ed.).....6

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 90.b. (2005 ed.).....3

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 91 (2005 ed.).....9

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 107 (2005 ed.).....9

CHARLES L. DECKER ET AL, LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES 14 (1951).....6-7

W. WINTHROP, MILITARY LAW AND PRECEDENTS 946 (rev.2d ed. 1920).....3

PETITION FOR WRIT OF CERTIORARI

Senior Airman Gabriel R. Contreras, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces is reported at 69 M.J. 120 (C.A.A.F. 2010). App., *infra*, at 1a-17a. The opinion of the United States Air Force Court of Criminal Appeals, *United States v. Contreras,* ACM 37233, 2009 WL 1508120 (A.F. Ct. Crim. App. May 28, 2009) (unpub. op.), is located at App., *infra*, at 20a-35a.

JURISDICTION

The Court of Appeals for the Armed Forces (CAAF) granted Petitioner's petition for review on January 15, 2010. App., *infra*, at 18a-19a. The CAAF's judgment was entered on June 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (2006).

STATUTES AND REGULATORY PROVISIONS INVOLVED

10 U.S.C. § 930, Article 130, UCMJ, and the MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV,

para. 56.c(3) (2005 ed.). App., *infra*, at 43a and 47a, respectively.

10 U.S.C. § 934, Article 134, UCMJ, and MANUAL FOR COURTS-MARTIAL, UNITED STATES pt IV, para. 90.b. (2005 ed.). App., *infra,* at 45a and 48a, respectively.

Article L, American Articles of War of 1775. App. *infra,* at 46a.

10 U.S.C. § 802, Article 2, UCMJ. App., *infra*, at 36a-38a.

10 U.S.C. § 884, Article 84, UCMJ. App., *infra*, at 39a.

10 U.S.C. § 892, Article 92, UCMJ. App., *infra*, at 40a.

10 U.S.C. § 910, Article 110, UCMJ. App., *infra*, at 41a.

10 U.S.C. § 915, Article 115, UCMJ. App., *infra*, at 42a.

10 U.S.C. § 933, Article 133, UCMJ. App., *infra*, at 44a.

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 91.b. (2005 ed.). App., *infra*, at 49a.

MANUAL FOR COURTS-MARTIAL, UNITED STATES pt IV, para. 107.b. (2005 ed.). App., *infra*, at 50a.

RULE FOR COURTS-MARTIAL (R.C.M.) 201(d)(1) provides that "Courts-martial have exclusive jurisdiction of purely military offenses."

STATEMENT OF THE CASE

This case involves deciding whether an offense arising under the General Article, Article 134, UCMJ,[1] constitutes a "purely military offense." Here the CAAF specifically addressed whether the offense of indecent acts with another, an offense arising under Article 134, UCMJ, (General Article), is a "purely military offense" for purposes of Article 130, UCMJ, Housebreaking. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 90.b. (2005 ed.) (MCM). More broadly speaking, this case involves the appropriate analysis to determine whether any offense under the UCMJ is "purely

---

[1] The General Article, Article 134, culminated a long line of American military jurisprudence. On June 30, 1775, the Continental Congress first enacted a provision which prohibited "all disorders and neglects . . . to the prejudice of good order and military discipline . . . ." Article L of the American Articles of War of 1775; W. WINTHROP, MILITARY LAW AND PRECEDENTS 946, 957 (2d ed. 1920). Language prohibiting "all conduct of a nature to bring discredit upon the military service," was added to later versions in 1916 and substantially retained in Article 134 with the enactment of the Uniform Code of Military Justice in 1951. Act of Aug. 29, 1916, c. 418, 39 Stat. 619, 666; *see Parker v. Levy*, 417 U.S. 733, 746 (1974).

military." The opinion below addressed these important federal questions.

1. On January 8-12, 2008, Petitioner, a senior airman in the United States Air Force, was tried at a general court-martial. Contrary to his pleas, Petitioner was found guilty of conspiring to commit indecent acts with another, with rape under the law of principals, and with housebreaking with the intent to commit indecent acts with another, in violation of 10 U.S.C. §§ 881, 920, and 930. In accordance with his plea, Petitioner was found guilty of committing an indecent act with Airman First Class (A1C) HS in violation of 10 U.S.C. § 934 and acquitted of indecent assault against A1C HS. The court-martial panel sentenced Petitioner to be confined for one year, to forfeit all of his pay and allowances, to be reduced to the lowest enlisted rank, and to be dishonorably discharged from the Air Force. The commander of the Seventh Air Force later dismissed the rape conviction and approved only so much of the adjudged sentence as provided for a bad-conduct discharge, confinement for five months, forfeiture of all pay and allowances, and a reduction to the lowest enlisted rank.

2. During his guilty plea for indecent acts with another, Petitioner testified that he engaged in a consensual sex act with A1C HS in her dormitory room in the presence of Senior Airman JA, who watched in enjoyment. Tr. at 30, 34-35, 39.

3. Petitioner appealed the conviction and sentence on multiple grounds.

a. The Air Force Court of Criminal Appeals (AFCCA) affirmed the findings and sentence. App., *infra* at 20a-35a. The AFCCA held that indecent

acts with another was not a purely military offense since the underlying conduct could be considered criminal conduct under Minnesota state law. App., *infra* at 28a.

b. The CAAF exercised its discretionary jurisdiction to decide "whether the housebreaking charge should be set aside because the underlying criminal offense, indecent acts with another under Article 134, UCMJ, is a purely military offense." App., *infra* at 18a-19a. The CAAF determined that indecent acts with another was not a purely military offense. App., *infra* at 3a. Under the CAAF's analysis, whether an offense is a "purely military offense" is determined by "reference to whether the elements of the underlying crime, either directly or by necessary implication, require that the accused be a member of the military." App., *infra* at 6a-9a. The CAAF noted that Article 134, UCMJ, applies to anyone "subject to this chapter," including civilians under Article 2(a), UCMJ, 10 U.S.C. § 802(a) (2006), and found that indecent acts was not "purely military" because it was not limited either expressly or by necessary implication to military members. App., *infra* at 10a-12a. The CAAF concluded that the housebreaking specification, which asserted Petitioner's intent to commit an indecent act with another, constituted a viable offense. App., *infra* at 12a.

c. Judge Baker concurred in the result. App., *infra* at 13a. Although he agreed with the majority's conclusion that indecent acts under 10 U.S.C. § 934 is not a purely military offense, he disagreed with the CAAF's analysis. *Id.* He critiqued the "elements test" adopted by the majority and asserted that the

better approach when determining whether an offense is "purely military" for purposes of *Manual for Courts-Martial, United States* pt. IV, para. 56.c(3) (2005 ed.) (*MCM*) entails an "examination of the gravamen of the offense, and not just the elements." App., *infra* at 14a-15a. He asserted that the CAAF analysis either incorrectly suggests that "a slew of purely military offenses apply to civilians" or confuses by indicating that a review of the statutory elements and Article 2, UCMJ, determines purely military offenses. App., *infra* at 17a. He states that "practitioners are really intended to look to the nature of the offense in context" to determine whether it is purely military in nature. *Id.*

REASONS FOR GRANTING THE PETITION

This CAAF decision addresses an important question of federal law—deciding the appropriate formula for determining whether an offense invoked under Article 134, the General Article, constitutes a "purely military offense." This determination and its application has significance to members of the United States Armed Forces both as a matter of substantive law and in the jurisdictional context.

Substantively, the *MCM* prevents a "purely military offense" from serving as an underlying criminal offense intended by an Accused for purposes of the Article 130, UCMJ, housebreaking offense. MCM pt. IV, para. 56.c(3) (2005 ed.). The President does not define "purely military offense" in that section of the *MCM*, but a discussion on jurisdiction defines the phrase as "those offenses which are not

generally denounced by a civil system of justice." CHARLES L. DECKER ET AL., LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, UNITED STATES 14 (1951). Rule for Courts-Martial (R.C.M.) 201(d)(1) signifies the jurisdictional significance of this phrase by providing that "Courts-martial have exclusive jurisdiction of 'purely military offenses.'" R.C.M. 201(d)(1).

Although this case involved the former Article 134, indecent act offense, which was replaced by changes to Article 120, UCMJ, effective October 1, 2007,[2] the CAAF's "elements test" for determining a "purely military offense" extends past Article 134, UCMJ, to all the offenses under the UCMJ. Moreover, the CAAF's analysis is not merely limited to Article 130, UCMJ, housebreaking purposes but has jurisdictional implications.

To settle the appropriate calculus for determining what constitutes a "purely military offense" for potentially millions of members of the United States Armed Forces and civilians subject to the UCMJ, this Honorable Court should grant this petition.

A. Certioari is necessary to settle the important federal law question of whether an offense arising under Article 134, UCMJ, is "purely military" where its terms require proof of uniquely military concepts.

---

[2] For incidents arising after October 1, 2007, indecent acts is criminalized under Article 120(k), UCMJ. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 55a(2)(f), 119 Stat. 3136, 3263 (2006).

1. The appropriate elements-based test to determine if an offense under the UCMJ is "purely military" involves examining its text for elements requiring proof of uniquely military concepts. In *Conliffe*, the CAAF followed an elements-based approach and determined that since Article 133, conduct unbecoming an officer and a gentleman, by its terms necessarily applied to only comissioned officers, cadets, or midshipmen, it constituted a purely military offense. *United States v. Conliffe*, 67 M.J. 127, 132 (C.A.A.F. 2009). Since the text of Article 134, UCMJ, requires proof that an underlying neglect or disorder was "to the prejudice of good order and discipline in the *armed forces*" or "of a nature to bring discredit upon the *armed forces*," unique military concepts, from its terms, Article 134 is a "purely military offense." (emphasis added). Based on these unique military concepts, the President likely conceived Article 134 offenses as being "purely military" when he precluded "purely military offenses" from serving as the underlying basis for an Article 130 housebreaking offense.

2. The CAAF, however, misapplied the elements test in this case by placing greater emphasis on language subjecting categories of civilians to potential courts-martial jurisdiction than on this element requiring proof that the underlying act prejudiced good order and discipline in the armed forces or was discrediting to the armed forces, leading to some irrational outcomes. Article 2(a), UCMJ, limits the class of civilians subject to possible courts-martial jurisdiction to only certain categories which share some connection to the military. 10 U.S.C. § 802(a). These narrow categories of civilians

should not be equated to the general civilian population. Second, this Court has long-disapproved of extending courts-martial jurisdiction over non-servicemembers. *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955); *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234 (1960); *Grisham v. Hagan,* 361 U.S. 278 (1960). This Court has asserted "that military tribunals have not been and probably never can be constituted in such [a] way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Toth v. Quarles,* 350 U.S. at 17. Since numerous offenses in the punitive articles of the UCMJ, including Article 134, UCMJ, contain language potentially subjecting certain categories of civilians to court-martial jurisdiction,[3] in one fell swoop, the CAAF's reasoning precludes a vast number of offenses from consideration as "purely military." In his concurring opinion, Judge Baker cites several examples of seeming military offenses which would not be considered "purely military" under the CAAF's reasoning, including effecting an unlawful enlistment, failing to obey a general regulation, hazarding a vessel, malingering, jumping from a vessel into the water, and straggling. App., *infra*, at 15a; 10 U.S.C. §§ 884, 892, 910, 915, 934 (2006); Articles 84, 92, 110, 115, 134, UCMJ; MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, paras. 91, and 107 (2005). The better approach, therefore, is to find an offense "purely military" when it contains elements requiring proof of uniquely military

[3] *See, e.g.,* 10 U.S.C. §§ 884, 892, 910, 915 (2006).

concepts regardless of whether the offense could potentially apply to civilians under Article 2, UCMJ.

B. The CAAF's analysis prejudiced Petitioner by not properly considering the uniquely military elements of Article 134, UCMJ, and upholding the Article 130 housebreaking conviction.

1. By not properly weighing the uniquely military element in Article 134, UCMJ, the CAAF erroneously determined that indecent acts with another was not a purely military offense. As a result, the CAAF erroneously determined that Article 134, UCMJ, served as an underlying "criminal offense" for Article 130, UCMJ, housebreaking, and upheld that conviction. Under a proper application of the elements test, the CAAF should have found that Article 134 indecent acts with another constituted a "purely military offense" which cannot serve as the underlying basis for an Article 130 housebreaking conviction. Since the housebreaking specification is no longer a viable offense, the finding should be set aside, and the case remanded for a rehearing on the sentence.

CONCLUSION

The CAAF erred when it misapplied the elements test and relied more on Article 134's potential application to civilians rather than on its uniquely military element when considering whether the offense was "purely military." As a result, the CAAF erred in its determination that indecent acts with another was not purely military and in upholding

Petitioner's improper conviction for Article 130 housebreaking. For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant his petition for a writ of certiorari.

Respectfully submitted,

PHILLIP T. KORMAN
Captain, U.S. Air Force
Counsel of Record

AF Legal Operations Agency
Appellate Defense Division
112 Luke Ave, Ste 343
Bolling AFB, DC 20332-8000
(202) 767-1562

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee

v.

Gabriel R. CONTRERAS, Senior Airman, U.S. Air Force, Appellant

No. 09-0754
69 M.J. 120

April 7, 2010, Argued
June 29, 2010, Decided

RYAN, J., delivered the opinion of the Court, in which EFFRON, C.J., and ERDMANN and STUCKY, JJ., joined. BAKER, J., filed a separate opinion concurring in part and in the result.

Counsel

For Appellant: Captain Phillip T. Korman (argued); Major Shannon A. Bennett, Major Michael A. Burnat (on brief); Colonel James B. Roan.

For Appellee: Captain Naomi N. Porterfield (argued); Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, and Gerald R. Bruce (on brief).

Military Judge: Mark L. Allred

Judge RYAN delivered the opinion of the Court.

The charges in this case stem from an evening of drinking that culminated in Appellant and another male airman entering the room of a female airman and each performing sexual acts with her in the presence of the other. A general court-martial convicted Appellant, in accordance with his pleas, of one specification of indecent acts (a violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2006)) and, contrary to his pleas, of one specification each of conspiracy, rape, and housebreaking (violations of Articles 81, 120, and 130, UCMJ, 10 U.S.C. §§ 881, 920, 930 (2006), respectively).[1] A panel composed of officer and enlisted members sentenced Appellant to a dishonorable discharge, one year of confinement, forfeiture of all pay and allowances, and reduction to the grade of E-1. The convening authority disapproved the rape conviction and altered the sentence to a bad-conduct discharge, five months of confinement, forfeitures of all pay and allowances, and reduction to E-1. The United States Air Force Court of Criminal Appeals (CCA) affirmed the

[1] Appellant was also charged with, but found not guilty of, one specification of indecent assault under Article 134, UCMJ.

altered findings and sentence. *United States v. Contreras,* No. ACM 37233, 2009 WL 1508120, at *6 (A.F.Ct.Crim.App. May 28, 2009).

We granted review of the following issue:

> WHETHER THE HOUSEBREAKING CHARGE SHOULD BE SET ASIDE BECAUSE THE UNDERLYING CRIMINAL OFFENSE, INDECENT ACTS WITH ANOTHER UNDER ARTICLE 134, UCMJ, IS A PURELY MILITARY OFFENSE.

As detailed below, we conclude that indecent acts with another, a violation of Article 134, UCMJ, is not a purely military offense.

DISCUSSION

Article 130, UCMJ, outlaws unlawful entry into "the building or structure of another with intent to commit a criminal offense therein." The President, however, has narrowed this language, stating that the definition of "criminal offense" does not extend to "an act or omission constituting a purely military offense." *Manual for Courts-Martial, United States* pt IV, para. 56.c(3) (2005) ed.) (*MCM*).[2] Appellant

---

[2] The President's analysis of the punitive articles is persuasive, but not binding, authority. *United States v. Miller,* 67 M.J. 87, 89 (C.A.A.F. 2008) (citing *United States v. Miller,* 47 M.J. 352, 356 (C.A.A.F.1997)). However, the Government expressly stated at oral argument that it was not challenging this limitation on the language of Article 130, UCMJ. Moreover,

argues that the housebreaking specification failed to state an offense because indecent acts (at the time a violation of Article 134, UCMJ)[3] is a purely military offense and thus cannot serve as the underlying criminal offense he allegedly had the intent to commit. This appeal thus continues our inquiry, begun last term in *United States v. Conliffe,* 67 M.J. 127 (C.A.A.F.2009), into what constitutes a "purely military offense."

A.

Whether a particular Article 130, UCMJ, "criminal offense" is a "purely military offense" is a question of law, which we review *de novo. See United States v. Rendon,* 58 M.J. 221, 224 (C.A.A.F.2003). Although the concept of a purely military offense predates the UCMJ by several decades, the *MCM* has never defined the phrase,[4]

"[w]here the President's narrowing construction is favorable to an accused and is not inconsistent with the language of a statute, 'we will not disturb the President's narrowing construction, which is an appropriate Executive branch limitation on the conduct subject to prosecution.' " *United States v. Guess,* 48 M.J. 69, 71 (C.A.A.F.1998) (quoting *United States v. Davis,* 47 M.J. 484, 486-87 (C.A.A.F.1998).

[3] For crimes committed after October 1, 2007, indecent acts falls under Article 120(k), UCMJ. National Defense Authorization Act for Fiscal Year 2006, Pub.L. No. 109-163, § 552(a)(2)(f), 119 Stat. 3136, 3263 (2006).

[4] The closest we have to an early *MCM* definition is in a separately compiled drafters' history of the 1951 *MCM* that—while discussing the jurisdictional rules that eventually became Rule for Courts-Martial (R.C.M.) 201, regarding exclusive and non-exclusive jurisdiction—defines purely military offenses as "those offenses which are not generally denounced by a civil

and neither party here has been able to explain either the genesis or purpose of this limit on Article 130, UCMJ, prosecutions. Almost every case referring to purely military offenses is focused on jurisdictional issues, *see, e.g., Woodrick v. Divich,* 24 M.J. 147, 150 (C.M.A.1987); *United States v. Ornelas,* 2 C.M.A. 96, 97, 6 C.M.R. 96, 97, 1952 WL 2283 (1952), and among those cases there is disagreement as to how the test for determining whether something is a purely military offense is formulated.[5]

Given the absence of guidance, we are left with a number of possible approaches, of which the parties urge two: Appellant believes that we should determine whether indecent acts is a purely military offense by reference to the elements of the offense

---

system of justice. They are such offenses as absence without leave, desertion, disrespect towards officers . . . and similar offenses of a military character." Charles L. Decker et al., *Legal and Legislative Basis, Manual for Courts-Martial, United States* 14 (1951); *accord MCM,* Analysis of Rules for Courts-Martial app. 21 at A21-8 (2008 ed.) [hereinafter Drafter's Analysis] ("Military offenses are those, such as unauthorized absence, disrespect, and disobedience, which have no analog in civilian criminal law.").

[5] *See, e.g., United States v. Marsh,* 15 M.J. 252, 254 (C.M.A.1983) (limiting purely military offenses to those offenses where the accused's status as a servicemember is an element of an offense); *United States v. Bailey,* 6 M.J. 965, 968 (N.C.M.R.1979) (en banc) ("In a purely military offense the accused's status [as a member of the military] is always a part of, or fundamentally underlies, one of the elements, but it is not, itself, a separate element."); *United States v. Rubenstein,* 19 C.M.R. 709, 788 (A.F.B.R. 1955) (citing numerous cases and treatises for definition of purely military offense as "an offense denounced only by military law").

itself; the Government believes that we should do so by looking at the gravamen of the act comprising the criminal offense and asking whether it is an act that is, or could be, a criminal offense under the law of any state or under federal law.

The CCA in this case adopted the latter approach. Although it recognized that Article 134, UCMJ, requires proof of one of two "military element[s]" (that the act or omission was "prejudicial to good order and discipline" or "service discrediting"), the CCA reasoned that because a Minnesota statute, Minn. Stat. § 617.23 (2009), criminalized conduct similar to the military's definition of indecent acts, indecent acts was not a purely military offense. 2009 WL 1508120, at *3.

B.

The Government asks us to adopt the CCA's approach and consider state laws that arguably prohibit the conduct that constituted the "indecent acts" in this case. But this approach is inconsistent with *Conliffe*, our only published opinion analyzing purely military offenses in the context of the housebreaking statute, Article 130, UCMJ.

In *Conliffe,* a United States Military Academy cadet unlawfully entered both the barracks room of a fellow cadet and an Academy sports team's locker room, where he set up cameras to record women changing clothes and showering. 67 M.J. at 130. He was charged with, and pleaded guilty to, three specifications of housebreaking, with the intended

criminal offense upon entry for each specification being conduct unbecoming an officer and a gentleman (an Article 133, UCMJ, 10 U.S.C. § 933 (2000), offense). 67 M.J. at 129-30. We held that the housebreaking convictions could not stand because Article 133, UCMJ, is a purely military offense. 67 M.J. at 132-33. The Government invited us in *Conliffe* to engage in a survey of state law similar to what the CCA did here, and to reference state laws criminalizing voyeurism (the conduct that was the basis for the Article 133, UCMJ, charge) to determine that the Article 133, UCMJ, offense was not a purely military offense. 67 M.J. at 133 n. 2. But we expressly declined that invitation, *id.*, focusing instead on the fact that Article 133, UCMJ:

> necessarily requires proof that the accused is a commissioned officer, cadet, or mid-shipman because the conduct must have disgraced or dishonored the accused in his, or her official capacity.... Only a commissioned military officer, cadet, or midshipman can commit the offense and it is only a court-martial that has jurisdiction to prosecute such an offense.

67 M.J. at 132 (citations and quotation marks omitted).

Our analysis focused on the status of the offender under the statute itself. Could Article 133, UCMJ, be violated by a person who is not a member of the military? The answer was clearly "no." By its own terms, Article 133, UCMJ, requires that the accused be a "commissioned

officer, cadet, or mid-shipman," and "[t]he focus of Article 133, UCMJ, is the effect of the accused's conduct on his status as an officer, cadet, or midshipman." *Id.* This focus on status was consistent with *Marsh* where we determined, in another context, that unauthorized absence, Article 86, UCMJ, 10 U.S.C. § 886 (1982), was a " 'peculiarly military' offense, for by its express terms the statutory prohibition applie[d] only to a 'member of the armed forces.' " 15 M.J. at 254.

Neither the CCA nor the parties to his case have given us a good reason to depart from this elements-based approach, which determines whether an offense is a "purely military offense" by reference to whether the elements of the underlying crime, either directly or by necessary implication, require that the accused be a member of the military. Nor is the Court aware of any important development in the short time since *Conliffe* was decided that would lead us to reconsider this analytic framework.

Moreover, this approach has the benefit of being consistent with the historical context in which the *MCM* was created. Part of the genesis behind the modern *MCM* was the understanding that military justice may be administered by non-lawyers, *see* United States Army, *The Army Lawyer: A History of the Judge Advocate General's Corps, 1775-1975* 206 (1975), sometimes in distant locations with only a *MCM* to guide them. We are not convinced that the President expected these non-specialists to conduct a fifty-state survey before deciding whether to charge a servicemember with

housebreaking.[6] It is equally as consistent with the stated purpose and historical context of the *MCM* that the President intended a simple, bright-line test that could be easily applied and determined by reference to the *MCM* itself. *See MCM*, Drafters' Analysis app. 21 at A21-1 ("[I]t was determined that the Manual for Courts-Martial should be sufficiently comprehensive, accessible, and understandable so it could be reliably used to dispose of matters in the military justice system properly, *without the necessity to consult other sources,* as much as reasonably possible.") (emphasis added).

Therefore, consistent with our decision in *Conliffe,* we decline to determine whether an offense is a purely military offense by conducting a survey of, or making other reference to, state and federal law. We devolve instead to consideration of the elements of the underlying offense.

C.

In this case, the underlying offense in the housebreaking specification is indecent acts. At the time Appellant committed his crimes, indecent acts with another was prohibited under Article 134,

---

[6] Even if one were to conduct such a survey, it would only lead to more questions: Do the jurisdictions that prohibit the conduct need to actually enforce the statute? How many jurisdictions must outlaw similar conduct before a crime loses its purely military character?

UCMJ. The statutory text of Article 134, UCMJ, provides that:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of the court.

The President, in the discussion section of the *MCM*, provides further limitations to this broad statutory language, stating that in order to punish indecent acts with another under Article 134, UCMJ, the Government must prove:

> (1) That the accused committed a certain wrongful act with a certain person;
> (2) That the act was indecent; and
> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

MCM pt IV, para. 90.b.

Article 134, UCMJ, by its terms, applies to anyone "subject to this chapter." Under the UCMJ, that phrase includes a variety of individuals who are not in the military. *See* Article 2(a), UCMJ, 10 U.S.C. § 802(a) (2006). Appellant's contention that any crime charged under clause 1 or 2 of Article 134, UCMJ, must be a purely military offense is therefore incorrect—the text of the UCMJ provides that Article 134, UCMJ, might be violated by persons who are not and never have been in the military.[7]

Of course, the *MCM* further limits the application of some offenses listed under Article 134, UCMJ, to military members only. *See, e.g., MCM* pt IV, paras. 83.b (fraternization); 84.b (gambling with

---

[7] Referencing Article 2(a), UCMJ, in the context of determining what constitutes a purely military offense does not answer or prejudice the altogether different question of whether non-servicemembers may be prosecuted under the UCMJ. Whether something is a "purely military offense" depends on whether the UCMJ limits prosecution for the offense to servicemembers or contemplates the prosecution of a non-servicemember, not on whether a non-servicemember may in fact be prosecuted in a particular case. *See, e.g., United States v. Stebbins*, 61 M.J. 366, 369 (C.A.A.F.2005) (holding that in determining whether death was the maximum authorized punishment for rape a court "need not answer the question of whether [the accused] may actually be sentenced to death"); *Willenbring v. Neurauter*, 48 M.J. 152, 180 (C.A.A.F.1998) (holding that rape was a capital crime for statute of limitation purposes regardless of whether the necessary factors were present to sentence the accused to death in that case); *United States v. Ealy*, 363 F.3d 292, 296-97 (4th Cir.2004) (holding that the statutory question of whether to apply the limitation period for capital or for non-capital offenses did not depend on whether the death penalty could be constitutionally imposed for the offense in question); *United States v. Manning*, 56 F.3d 1188, 1195-96 (9th Cir.1995) (same).

subordinate). These are purely military offenses. Other crimes, however, are not so limited, nor would anyone otherwise consider them to be purely military offenses despite the necessity of proving and pleading that the conduct was service discrediting or prejudicial to good order and discipline. *See, e.g., id.* paras. 66.b (bribery and graft); 92.b (kidnapping); 97.b (pandering and prostitution).[8]

The application of Article 134, UCMJ, to punish indecent acts with another is not limited to military members, either expressly or by necessary implication. Consequently, Appellant's housebreaking specification stated a viable offense when it alleged he unlawfully entered a fellow airman's room with the intent to commit indecent acts.

---

[8] Of course, as always, the President's analysis of the punitive articles is persuasive authority and may potentially further limit the application of some punitive articles to military members only, just as he limited the application of the housebreaking statute to cases where the underlying offense was something other than a purely military offense. *See supra* note 2 and accompanying text. This Court can consider such a Presidential limitation while applying an elements-based approach. *Contra Contreras,* 69 M.J. at 126 (Baker, J., concurring in result). And in the unlikely event that we are presented with a case where a person unlawfully entered the building or structure of another with the intent to jump from a vessel, wrongfully cohabitate therein, or any of the other examples described by the concurring opinion, *see id.* at 125 & n.2, 126, we are confident that we can fairly address those situations under the framework set forth in *Conliffe* and further explained here.

DECISION

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

BAKER, Judge (concurring in the result):

I agree with the conclusion in this case: the offense of indecent acts as charged under clause 1 or 2 of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2006), is not a purely military offense. However, I disagree with the Court's analysis in reaching this conclusion.

In particular, the majority adopts an "elements test" to determine whether an offense is "purely military" in nature:

> Therefore, consistent with our decision in *Conliffe,* we decline to determine whether an offense is a purely military offense by conducting a survey of, or making other reference to, state and federal law. We devolve instead to consideration of the elements of the underlying offense.
>
> . . . .
>
> Article 134, UCMJ, by its terms, applies to anyone "subject to this chapter." Under the UCMJ, that phrase includes a variety of individuals who are not in the military. *See* Article 2(a), UCMJ, 10 U.S.C. § 802(a) (2006).

> Appellant's contention that any crime charged under clause 1 or 2 of Article 134, UCMJ, must be a purely military offense is therefore incorrect—the text of the UCMJ provides that Article 134 might be violated by persons who are not and never have been in the military.

United States v. Contreras, 69 M.J. at 123-24 (C.A.A.F.2010).[1] In short, because the text of clause 1 of Article 134, UCMJ, refers to "persons subject to this chapter," and Article 2, UCMJ, 10 U.S.C. § 802 (2006), potentially reaches civilians, the majority concludes that the offense of indecent acts is not a purely military offense. Of course, by the same "elements" reasoning, effecting an unlawful enlistment, failing to obey a general regulation,

---

[1] The majority cites *United States v. Conliffe*, 67 M.J. 127 (C.A.A.F.2009), in support of its "elements-based" approach, suggesting that *Conliffe* was based on the statutory status of a commissioned officer, i.e., that the element of the offense includes one's status as a commissioned officer. To the contrary, the *Conliffe* analysis was contextual. The analysis was not exclusive, but rather focused on the nature of the offense: "The focus of Article 133, UCMJ, is the effect of that accused's conduct on his status as an officer, cadet, or midshipmen . . . ." *Id.* at 132. This reference to status is not statutory, but rather directed to an officer's status as a leader. As a result, only a commissioned military officer, cadet, or midshipman could commit the offense, because only such persons could undermine their leadership status in the same roles. That *Conliffe* offered a contextual perspective, rather than an elements-based rule, was reinforced in note 2 stating: "[We] decline to decide today whether an Article 134, UCMJ, offense can serve as the underlying criminal offense in a housebreaking charge, we note that Articles 133 and 134, UCMJ, contain at least one significant difference." *Id.* at 133.

hazarding a vessel, and malingering would not be purely military offenses.[2] Such a conclusion, as a practical matter, largely may be irrelevant in the context of Article 130, UCMJ, 10 U.S.C. § 930 (2006); however, the term has jurisdictional implications as well. The President has employed the term in Rule for Courts-Martial 201(d)(1) in the jurisdictional context stating, "Courts-Martial have exclusive jurisdiction of purely military offenses." Moreover, the majority seems to prejudge both the jurisdictional issues and substantive law issues that might arise were a civilian charged with a violation of the UCMJ.

The better approach when determining whether an offense is "purely military" for the purposes of *Manual for Courts-Martial, United States* pt. IV, para. 56.c(3) (2005 ed.) (*MCM*), is that taken by this Court prior to this case, which entails examination of the gravamen of the offense, and not just the elements. In this regard, civilian practice with reference to federal and state law is not dispositive, as the Government seems to suggest, but it may offer relevant context, just as the absence of any "persons subject to this chapter" other than military members being charged with an offense, might help to inform a judgment as to whether an offense was purely military in nature.

An "elements test" is superficially appealing for a number of reasons. First, it appears to offer

---

[2] Articles 84, 92, 110, and 115, UCMJ, 10 U.S.C. §§ 884, 892, 910, 915 (2006). Under Article 134, UCMJ, the following offenses would also not be considered purely military ones: disloyal statements, jumping from a vessel into the water, and straggling.

certitude, in lieu of the case-by-case analysis required from contextual analysis. Second, in some cases the "purely military" nature of the offense may be easily ascertained from the statutory elements language. Likewise, the *MCM* further limits some offenses under Article 134, UCMJ, through elements that expressly confine the offense to military members. However, the fact that an "elements test" gets to the right result in some cases (including this one) does not make it an appropriate substitute for the contextual analysis heretofore required an applied in this area of law.

A quick review of the punitive articles set forth in the *MCM* reveals why. Consider the offense of malingering under Article 115, UCMJ, 10 U.S.C. § 915 (2006). Under the UCMJ, the offense applies to "[a]ny person subject to this chapter." The elements of this offense do not appear to limit the offense to military members. It is not until one resorts to contextual analysis beyond the statutory elements of the offense read with Article 2(a), UCMJ, that one learns in the explanation section in the *MCM* for this offense that we see the limitation to "work, duty, or service . . . expected of one in the military service." *MCM*, pt. IV, para. 40.-(c)(1). Thus, notwithstanding the statutory language and the absence of a limitation in the statutory elements, one *would* otherwise consider this a purely military offense. Consider also the offense of wrongful cohabitation under clause 1 or 2 of Article 134, UCMJ, where "the accused and another person openly and publicly lived together as husband and wife" when they were not in fact married. *MCM*, pt. IV, para. 69.b(1). Again, the elements do not appear to limit the

offense to military members and under the majority's paradigm, one would not otherwise consider this a purely military offense. However, in the wake of United States Supreme Court cases about individual privacy rights, it would seem that no one other than perhaps a military member would be subject to prosecution for this offense.

In short, while the expedience of the "elements-based" approach may possess some superficial appeal, where we are implicating the application of military law to civilians, as the majority does here, we should paint with a fine contextual brush rather than a broad one of black letter law. Moreover, if applied literally the majority's analysis will result in absurd results. More likely, the Court will revert to contextual analysis, in which case it is not adopting an "elements test" at all, but rather adding a layer of confusion to the law, by in fact applying a contextual approach, while purporting to apply a black letter and predictable rule. This is suggested by the opinion's language stating: "Other crimes, however, are not so limited, nor would anyone otherwise consider them to be purely military offenses . . . ." *Contreras*, 69 M.J. at 124. In short, the majority's analysis is either incorrect—suggesting that a slew of purely military offenses apply to civilians—or it is confusing—suggesting that a review of statutory elements and Article 2, UCMJ, will determine which offenses are purely military when in fact this Court and practitioners are really intended to look to the nature of the offense in context to determine whether it is purely military in nature.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

USCA Dkt. No. 09-0754/AF
Crim. App. No. 37233

United States, Appellee

v.

Gabriel R. CONTRERAS, Appellant

ORDER GRANTING REVIEW

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 15th day of January, 2010,

ORDERED:

That said petition is hereby granted on the following issue:

WHETHER THE HOUSEBREAKING CHARGE SHOULD BE SET ASIDE BECAUSE THE UNDERLYING CRIMINAL OFFENSE, INDECENT ACTS WITH ANOTHER UNDER ARTICLE 134, UCMJ, IS A PURELY MILITARY OFFENSE.

Briefs will be filed under Rule 25.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

APPENDIX C

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman GABRIEL R. CONTRERAS, United States Air Force

ACM 37233
2009 WL 1508120 (A.F. Ct. Crim. App.)
28 May 2009, Decided

NOTICE: NOT FOR PUBLICATION

DISPOSITION: AFFIRMED.

GCM convened at Osan Air Base, Republic of Korea. Military Judge: Mark L. Allred. Approved Sentence: Bad Conduct Discharge, confinement for 5 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, Captain

Coretta E. Gray, and Captain Naomi N. Porterfield.

Before WISE, BRAND, and HELGET, Appellate Military Judges.

OPINION OF THE COURT

HELGET, Judge:

A general court-martial composed of officer and enlisted members convicted the appellant, contrary to his pleas, of conspiring to commit indecent acts with another, rape,[1] and housebreaking, in violation of Articles 81, 120, and 130, UCMJ; 10 U.S.C. §§ 881, 920, and 930. He was convicted, in accordance with his plea, of committing indecent acts with another, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged sentence consisted of a dishonorable discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to E-1. The convening authority disapproved the rape specification and charge under Article 120, UCMJ, and only approved so much of the sentence as provides for a bad-conduct discharge, confinement for five months, forfeiture of all pay and allowances, and reduction to E-1. The appellant asserts the following five assignments of error:

---

[1] The appellant was convicted of rape under the law of principals as it was Senior Airman (SrA) JA who actually raped Airman First Class (A1C) HS.

I.

WHETHER THE HOUSEBREAKING CHARGE SHOULD BE SET ASIDE BECAUSE THE BASIS OF THE UNDERLYING CRIMINAL OFFENSE IS A PURELY MILITARY OFFENSE.

II.

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY TO THE HOUSEBREAKING CHARGE.

III.

WHETHER THE MILITARY JUDGE'S FAILURE TO PROPERLY INSTRUCT ON MISTAKE OF FACT AS A DEFENSE TO THE HOUSEBREAKING CHARGE WAS HARMFUL ERROR.

IV.

WHETHER THE EVIDENCE IS LEGALLY AND FACTUALLY INSUFFICIENT TO SUSTAIN A FINDING OF GUILTY TO THE CONSPIRACY CHARGE.[2]

---

[2] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

V.

WHETHER THE APPELLANT'S APPROVED SENTENCE TO A BAD-CONDUCT DISCHARGE IS INAPPROPRIATELY SEVERE.[3]

Background

This case involved Airman First Class (A1C) HS' alleged consensual and nonconsensual conduct with three airmen—the appellant, Senior Airman (SrA) MJ, and SrA JA. On 8 February 2007, A1C HS arrived at Osan AB, Republic of Korea. On 10 February 2007, she went out to a few bars with a group of airmen from her squadron, including the appellant. She testified[4] that she had never met the appellant prior to this night. She only remembered going to two off-base bars and drinking a variety of alcoholic drinks to the point where she became "pretty intoxicated."[5] She also only

---

[3] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[4] A1C HS testified pursuant to a grant of testimonial and transactional immunity.

[5] According to Major (Maj) MG, an expert in the field of toxicology, she estimated A1C HS's blood alcohol concentration at 0330 on 11 Feb 2007—the time of the alleged rape—to be between .199 and .319, depending upon her metabolism. Maj MG testified that most people who reach a level of .20 are showing clear signs of intoxication and at a level of .30, many people are medically comatose, which means unresponsive. Dr. JY, an expert in forensic toxicology, testified that blackouts, a period when individuals are still functioning but they will not remember what happened, occur at a blood alcohol concentration level of .20 and higher.

remembered flirting with the appellant, but claimed that she could not recall going anywhere else or doing anything else over the course of the evening. Other witnesses testified that A1C HS went to two other bars that night and into the early morning hours of 11 February 2007. A1C HS was observed sitting on the appellant's lap, kissing him throughout the night, and dancing with him provocatively on the dance floor. She was also observed swaying back and forth, stumbling, and her eyes were red and half closed.

A1C HS testified her first memory after attending the first two bars was waking up in her dorm room with SrA MJ digitally penetrating her vagina.[6] She noticed that the appellant was in the room at the same time, sitting at her computer desk. The next thing she remembered was waking up sometime later, but this time SrA JA was on top of her engaged in sexual intercourse. She observed that the appellant was still in the room. She told SrA JA to stop. SrA JA had a confused look on his face but he complied and immediately stopped. He then left the room at her request. According to the testimony of SrA JA,[7] after he left, he heard her yelling at the appellant saying that he was going to feel sorry for what he had done. A short time later, the appellant departed A1C HS' room and went to SrA JA's room to report that A1C HS was very upset but he, the appellant, had calmed her down.

After the appellant left her room, A1C HS proceeded to find a friend whom she knew from her

---

[6] A1C HS testified that this encounter was consensual.

[7] SrA JA testified pursuant to a grant of testimonial immunity.

previous assignment. After talking to her friend, his roommate and SrA MJ, she decided to go to the hospital and report the sexual assault.

Government prosecutors called additional witnesses to offer evidence of how SrA JA came to be in A1C HS' room having intercourse with her. According to the testimony of SrA JP,[8] at approximately 0300 on 11 February 2007, the appellant came to her room and, referring to A1C HS, stated, "I just [engaged in sexual intercourse with] that girl."[9] A few minutes later, SrA JA knocked on the door and the appellant went with SrA JA to have a cigarette. SrA JA testified that on the way down to the dorm's "smoke pit," the appellant informed SrA JA that he had just had sex with A1C HS and SrA MJ was also present. The appellant stated that A1C HS was a "squirter" and asked SrA JA if he wanted to seek her squirt. They proceeded to SrA JA's room to obtain some condoms and then went to A1C HS's room. The appellant knocked on the door, turned the handle and went in. The appellant did not wait for a response from A1C HS before entering her room. When they entered her room, they saw SrA MJ lying on one bed naked and A1C HS was lying on the other bed under the covers. They were both asleep. SrA JA went back to his room to obtain a camera because they wanted to take a picture of SrA MJ sleeping in the nude. After

---

[8] SrA JP was an acquaintance of the appellant's at Osan AB.

[9] A1C HS could not remember her interactions with the appellant; however, she indicated that he had permission to be in her room while she was engaging in sexual acts with SrA MJ. In addition, SrA MJ testified that both he and the appellant engaged in consensual sexual acts with A1C HS.

taking pictures of SrA MJ, SrA JA woke him up and escorted SrA MJ out of A1C HS's room.

SrA JA testified that, when he returned to A1C HS's room after escorting SrA MJ out, A1C HS had awoke and she and the appellant started kissing. At some point, the appellant digitally penetrated her vagina while SrA JA sat and watched. Shortly thereafter, SrA JA began to digitally penetrate A1C HS. After he digitally penetrated A1C HS, SrA JA proceeded to engage in sexual intercourse with A1C HS until she told him to stop. SrA JA's testimony contradicted A1C HS' testimony in that he claimed she consented to all of the sexual activity while she maintained that she did not give him consent as she had never met him before.

SrA MJ testified[10] that he first met A1C HS on the night of 10 February 2007 in another airman's dorm room prior to going downtown that night. Although he did not remember exactly how it occurred, at some point after they had all been out drinking, he ended up in A1C HS' room with her and the appellant. They both engaged in various consensual sexual activities with A1C HS in the presence of each other. SrA MJ testified that at no point did she ever direct either of them to leave the room. Additionally, when he spoke to A1C HS after he heard she had claimed to be raped, she stated the sexual relations with him and the appellant were consensual and she was raped by someone she did not know. A1C HS also told him that she did not object to SrA MJ and the appellant being in her

---

[10] SrA MJ testified pursuant to a grant of testimonial immunity.

room. However, A1C HS testified that she did not give consent to either SrA JA or the appellant to be in her room the second time.

Housebreaking

The first assignment of error is that the housebreaking charge should be set aside because the underlying Article 134, UCMJ offense of indecent acts with another is a purely military offense.

The question of whether an underlying offense is a purely military offense is a question of law that we review de novo. *United States v. Conliffe*, 67 M.J. 127, 131 (C.A.A.F. 2009). Under Article 130, UCMJ, an accused who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking. The second element of housebreaking, the element at issue here, "'requires a specific intent to enter with the intent to commit [a criminal] offense.'" *Conliffe*, 67 M.J. at 131 (quoting *United States v. Peterson*, 47 M.J. 231, 235 (C.A.A.F. 1997). The *Manual for Courts-Martial, United States (MCM)* Part IV, ¶ 56.c.(3) (2008 ed.) defines a criminal offense as "any act or omission which is punishable by courts-martial, except an act or omission constituting a purely military offense."

The appellant relies upon *Conliffe,* in which our superior court held that conduct unbecoming an officer and gentleman under Article 133, UCMJ, 10 U.S.C. § 933, is a purely military offense, and cannot serve as the underlying criminal offense in a

housebreaking charge. However, in *Conliffe*, our superior court specifically declined to decide whether an Article 134, UCMJ offense can serve as an underlying offense in a housebreaking charge. *Conliffe*, 67 M.J. at 133 n.2. Notwithstanding this, our superior court did note one significant difference between an Article 133 and Article 134, UCMJ offense. Under Article 133, UCMJ, an accused can be charged with either the Article 133, UCMJ, offense or the enumerated punitive article based on the same underlying conduct, whereas under Article 134, UCMJ, the preemption doctrine prohibits the government from charging an accused under Article 134, UCMJ, clauses 1 and 2, for conduct that is appropriately charged under an enumerated article. *Id.* In its appellate brief, the government submitted a Minnesota State Statute that makes unlawful any open or gross, lewd or lascivious behavior, or any public indecency.

We find that the offense of indecent acts with another is not a purely military offense. Although offenses under Article 134, UCMJ, clauses 1 and 2, include a purely military element that either the conduct is prejudicial to good order and discipline or is service discrediting, the core of many of the offenses criminalizes conduct similar to other jurisdictions. In this case, it appears the conduct which formed the basis of the offense of indecent acts with another would also be considered criminal conduct in the state of Minnesota. Accordingly, we find that the offense of indecent acts with another is not a purely military offense.

Legal and Factual Sufficiency

The appellant asserts that the evidence is legally and factually insufficient to sustain findings of guilty to the housebreaking and conspiracy charges. In accordance with Article 66(c), UCMJ, 10 USC § 866(c), we review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for legal sufficiency of the evidence is ""whether, considering the evidence in the light most favorable to the prosecution, any reasonable fact-finder could have found all the essential elements beyond a reasonable doubt."" *United States v. Day*, 66 M.J. 172, 173 (C.A.A.F. 2008) (quoting *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses [we] are [ourselves] convinced of the accused's guilt beyond a reasonable doubt." *Turner*, 25 M.J. at 325. Review of the evidence is limited to the entire record, which includes only the evidence admitted at trial and exposed to the crucible of cross-examination. Article 66(c), UCMJ, *United States v. Bethea*, 46 C.M.R. 223, 224-25 (C.M.A. 1973).

There is ample evidence in the Record of Trial that the appellant committed the charged offenses. The evidence clearly shows that the appellant conspired with SrA JA to commit indecent actions upon A1C HS and that he entered her dormitory room without her permission with the intent to commit indecent acts upon her. Accordingly,

considering the evidence in the light most favorable to the prosecution, a reasonable fact finder could have found all the essential elements beyond a reasonable doubt and concluded the appellant committed the offenses of housebreaking and conspiracy. Furthermore, we are ourselves convinced of the appellant's guilt beyond a reasonable doubt.

Failure to Instruct on Mistake of Fact as a Defense

The appellant contends that the military judge failed to properly instruct on mistake of fact as a defense to the housebreaking charge. The appellant claims that although the military judge advised the members of the mistake of fact defense concerning the underlying offense of indecent acts with another, the military judge failed to advise the members that the instruction on the mistake of fact defense also applied to the first element of housebreaking. The appellant contends the military judge should have instructed the members that the mistake of fact defense applied to whether the appellant mistakenly believed he had consent to enter A1C HS's room, independent of whether he believed he had consent to commit an indecent act.

The standard of review for alleged instructional error is de novo. *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003). Absent objection by the trial defense counsel, the error, if any, is waived absent plain error. *United States v. Blough*, 57 M.J. 528, 534 (A.F. Ct. Crim. App. 2002). "Even if the sentencing instructions were erroneous, we will not

grant relief absent a showing of material prejudice to a substantial right." *Id.* (citations omitted). If there is a Constitutional error, we may not affirm the case unless the error was harmless beyond a reasonable doubt. *United States v. Grijalva,* 55 M.J. 223, 228 (C.A.A.F. 2001); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

In addition to giving the members an instruction on the mistake of fact defense concerning indecent acts, the military judge also gave the members an instruction on the mistake of fact defense as it applied to the lesser included offense of unlawful entry. However, the military judge did not give this instruction with respect to the first element of the housebreaking charge. Although the military judge was trying not to confuse the members, the military judge should have instructed the members on the mistake of fact defense for the first element of housebreaking. However, we find that this error did not prejudice the appellant. Having found that the appellant conspired with SrA JA to commit indecent acts upon A1C HS, the only issue remaining for the members was whether or not the appellant had consent to reenter A1C HS's dorm room, or reasonably believed that he did. *See United States v. Peterson*, 47 M.J. 231, 234-35 (C.A.A.F. 1997) (the unlawful entry element of housebreaking is a general intent crime, therefore any mistake of fact must be both "subjectively held and reasonable in light of all the circumstances"). The evidence clearly shows A1C HS did not give the appellant consent to reenter her room, nor did the appellant have any reasonable belief that she did consent. The only credible evidence that the appellant believed he had

A1C HS' consent to enter her room is that she had consented to his presence in her room earlier in the evening. But this fact is greatly outweighed by all other facts and circumstances surrounding the charge. Just because an accused is given permission to enter a structure at one point in time or for one purpose does not mean that accused can reenter that structure at any time, for any purpose. *See United States v. Davis,* 54 M.J. 622 (A.F. Ct. Crim. App. 2000) (accused who had unfettered access to warehouse for duties can commit housebreaking by entering warehouse while off-duty and without lawful purpose); *United States v. Carroll,* 45 M.J. 604 (Army Ct. Crim. App. 1997) (accused guilty of housebreaking where he reentered female soldier's dorm room several hours after attending a party in her room); *United States v. Fayne*, 26 M.J. 528 (A.F.C.M.R. 1988) (accused guilty of housebreaking when he re-entered his wife's home without her permission to commit a crime). In this case the appellant had no lawful authority to reenter A1C HS's room. *Cf. Davis*, 54 M.J. at 625 ("[W]hen one enters a building with proper authority but also has the intent to commit a crime, the entry is not unlawful.") Moreover, given the lateness of the hour, a considerable amount of time passed between the appellant's departure and return.[11] We find, beyond a reasonable doubt, that the appellant had no

---

[11] The appellant left SrA HS' room for anywhere from 30 to 90 minutes. The appellant told investigators he was in A1C HS's room at 0200. As previously noted, SrA JP testified the appellant came to her room no later than 0300. SrA JA testified the appellant brought him to A1C HS's room at approximately 0330.

reasonable belief that he was entitled A1C HS' room. *Peterson*, 47 M.J. at 235.

Accordingly, the appellant was not prejudiced by the military judge's failure to instruct the members on the mistake of fact defense concerning the first element of the housebreaking charge.

Inappropriately Severe Sentence

The appellant asserts that his sentence, which includes a bad-conduct discharge, is inappropriately severe. We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ. We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Barc*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). Sentence comparison is generally inappropriate, unless this Court finds that any cited

cases are "closely related" to the appellant's case and the sentences are "highly disparate." *Lacy*, 50 M.J. at 288 (citing *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). "An appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Id.*

The maximum punishment in this case was a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to E-1. The appellant's approved sentence was a bad-conduct discharge, confinement for five months, forfeiture of all pay and allowances, and reduction to E-1.

Comparing his case to his co-conspirator, SrA JA, the appellant claims that the two sentences are highly disparate. SrA JA, who was found guilty by a military judge sitting alone of conspiracy to commit indecent acts with another, indecent acts with another, and adultery,[12] was sentenced to confinement for 15 days, forfeiture of $500 pay for one month and reduction to E-3. Although the two cases are closely related, even if we were to find that the sentences are highly disparate, the government has provided a rational basis for the disparity. In this case the appellant was the instigator who went bragging to various other airmen about his sexual encounter with A1C HS. He invited SrA JA and led him to A1C HS' room, he encouraged SrA JA to

[12] SrA JA was acquitted of rape, housebreaking, and indecent assault upon A1 HS.

perform indecent acts upon A1C HS, and A1C HS was upset with the appellant for allowing SrA JA to commit indecent acts upon her. Had the appellant refrained from engaging in this behavior, the charged misconduct would not have likely occurred. Accordingly, the appellant's conduct warranted a more severe punishment.

Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

APPENDIX D

10 U.S.C. §802, Article 2(a), UCMJ, (2006), provides the following:

(a) The following persons are subject to this chapter:

(1) Members of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment; volunteers from the time of their muster or acceptance into the armed forces; inductees from the time of their actual induction into the armed forces; and other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it.

(2) Cadets, aviation cadets, and midshipmen.

(3) Members of a reserve component while on inactive-duty training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service.

(4) Retired members of a regular component of the armed forces who are entitled to pay.

(5) Retired members of a reserve component who are receiving hospitalization from an armed force.

(6) Members of the Fleet Reserve and Fleet Marine Corps Reserve.

(7) Persons in custody of the armed forces serving a sentence imposed by a court-martial.

(8) Members of the National Oceanic and Atmospheric Administration, Public Health Service, and other organizations, when assigned to and serving with the armed forces.

(9) Prisoners of war in custody of the armed forces.

(10) In time of war, persons serving with or accompanying an armed force in the field.

(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with,

employed by, or accompanying the armed forces outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

(12) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons within an area leased by or otherwise reserved or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Canal Zone, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands.

APPENDIX E

10 U.S.C. §884, Article 84, UCMJ, (2006), Unlawful enlistment, provides the following:

Any person subject to this chapter who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.

APPENDIX F

10 U.S.C. §892, Article 92, UCMJ, (2006), Failure to obey order or regulation, provides the following:

Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

APPENDIX G

10 U.S.C. §910, Article 110, UCMJ, (2006), Improper hazarding of vessel, provides the following:

(a) Any person subject to this chapter who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces shall suffer death or such punishment as a court-martial may direct.

(b) Any person subject to this chapter who negligently hazards or suffers to be hazarded any vessel of the armed forces shall be punished as a court-martial may direct.

APPENDIX H

10 U.S.C. §915, Article 115, UCMJ, Malingering, (2006), provides the following:

Any person subject to this chapter who for the purpose of avoiding work, duty, or service—

(1) feigns illness, physical disablement, mental lapse, or derangement; or

(2) intentionally inflicts self-injury;

shall be punished as a court-martial may direct.

APPENDIX I

10 U.S.C. §930, Article 130, UCMJ, (2006), Housebreaking, provides the following:

Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

APPENDIX J

10 U.S.C. §933, Article 133, UCMJ, (2006), Conduct unbecoming an officer and a gentleman, provides the following:

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

APPENDIX K

10 U.S.C. §934, Article 134, UCMJ, (2006), General article, provides the following:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

APPENDIX L

Article L, American Articles of War of 1775, W. WINTHROP, MILITARY LAW AND PRECEDENTS 946, 957 (rev.2d. ed. 1920), states the following:

All crimes, not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the articles of war, are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and be punished at their discretion.

APPENDIX M

The MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 56.c(3) (2005 ed.), defines "criminal offense" for Article 130, UCMJ, Housebreaking:

Criminal offense. Any act or omission which is punishable by courts-martial, except an act or omission constituting a purely military offense, is a "criminal offense."

APPENDIX N

The MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 90.b. (2005 ed.), provides the following elements for Article 134-(Indecent acts with another):

(1) That the accused committed a certain wrongful act with a certain person;

(2) That the act was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

APPENDIX O

The MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 91.b. (2005 ed.), provides the following elements for Article 134-Jumping from vessel into the water:

(1) That the accused jumped from a vessel in use by the armed forces into the water;

(2) That such act by the accused was wrongful and intentional; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

APPENDIX P

The MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, para. 107.b. (2005 ed.), provides the following elements for Article 134 (Straggling):

> (1) That the accused, while accompanying the accuse's organization on a march, maneuvers, or similar exercise, straggled;
>
> (2) That the straggling was wrongful; and
>
> (3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.